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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1958**

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CHARLES ALLEN TAYLOR,

*Petitioner,*

*v.*

NEIL McELROY, A. TYLER PORT,

*Respondents*

---

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PPOSITION TO GOVERNMENT'S SUGGESTION OF MOOTNESS

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## OPPOSITION TO GOVERNMENT'S SUGGESTION OF MOOTNESS

Far from accomplishing its objective of mooting petitioner's case by the eleventh hour clearance granted him, all that the Government has done by this last minute action is to give the Court a further demonstration of the arbitrary nature of a security program in which "clearance" can be based on nothing more than the proximity of this Court's process.

From September of 1956 when petitioner was first accused (R. 37) until October 13, 1958, when for the

second time the Defense Department found him guilty and denied him security clearance (R. 120), respondents relied upon the accusations of six secret informants who asserted and still assert that petitioner was once a Communist Party member. Under the pertinent Defense Department Regulation these informants were not made available for petitioner's examination at his security "hearings". After this Court granted certiorari to review the confrontation issue thus presented, respondents hastily granted petitioner a clearance—without, however, any exoneration from or recantation of the charges that petitioner was once a Communist Party member and has been untruthful in denying membership. Under these circumstances the Government's suggestion that petitioner's request for injunctive and declaratory relief is moot cannot be accepted; petitioner remains within the scope of the industrial security program, including its continuing "no-confrontation" provision, and is more than likely to be subjected to renewed proceedings upon the basis of the assertions of the six unrepudiated secret informants if this Court's process fades into the distance. As we shall show (see *infra*, pp. 10 to 19), under the repeated decisions of this Court, petitioner's continuing subjection to the challenged "hearing" procedures which have already caused him two and a half years of unemployment and security taint provides a clearly continuing case and controversy for this Court's adjudication. Indeed, far from rendering the case moot, the Government's latest action only provides additional ground for this Court's review by demonstrating the inevitably arbitrary result of basing security determinations on secret evidence which permits one conclusion today and exactly the opposite conclusion yesterday or tomorrow.

Thus petitioner is confident that the case is far from moot—we respectfully suggest, nevertheless, that the Court may want to follow what appears to be its practice in

similar cases and postpone the issue of mootness until it has had the benefit of the oral arguments. See, e.g., *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43; *Walling* v. *Reuter Co.*, 321 U.S. 671; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346; *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290. The record has been printed and petitioner's brief on the merits is due and will be filed prior to this Court's consideration of the suggestion of mootness. Because the question of mootness is intertwined with the facts on the merits and because oral presentations before this Court and interrogation of counsel may provide illumination upon the "likelihood of recurrence", which is the touchstone of continuing justiciability, postponement of the Court's determination of the mootness issue would be peculiarly appropiate here. Finally, the far-reaching double standard of mootness upon which the Government rests its contention (see *infra*, pp. 14 to 16) would require the overruling of decisions of this Court—a course which certainly should not be considered without benefit of full argument.

Under these circumstances we believe the Court will not want to consider the mootness issue at this time. For the Court's convenience, however, and in response to the Government's memorandum, we analyze herein the facts and authorities bearing upon the suggestion that no case or controversy remains for this Court's adjudication.

## I

### Statement of Facts

Petitioner was employed from 1941 until 1956 as a tool maker at Bell Aircraft Corporation, Buffalo, New York (R. 2, 29-30). On September 6, 1956, the Defense Department's Office of Industrial Personnel Security Review dis-

patched a letter to the company suspending all clearances for access to classified defense information then held by petitioner (R. 34). Petitioner was thereupon discharged from his employment (R. 30, 40). Shortly thereafter he received from the Office of Industrial Personnel Security Review a "Statement of Reasons" for the suspension of his clearance (R. 38), charging that "information before this Board indicates" that in 1942 and 1943 petitioner had been a member of, paid dues to, and held a membership card in, the Communist Party. Petitioner promptly entered a sworn denial of the charge (R. 42).

On November 1, 1956, petitioner appeared at a "hearing" before the Defense Department's New York Industrial Personnel Security Hearing Board to defend himself against the charge of Communist Party affiliation some 13 or 14 years earlier. At the outset of the hearing, the Government made clear that, in accordance with the pertinent Defense Department Regulation,[1] it would produce no evidence in support of its charge of Communist affiliation or even inform petitioner of the names of his accusers (R. 18, 126-130). Petitioner, nevertheless, assuming the burden of proving his innocence, testified under oath that he had never been a member of, paid dues to, held a card in, or aided or abetted, the Communist Party in any manner (R. 353-413). He not only gave categorical sworn denials to the charge of Communism and each facet thereof, but he demonstrated his public opposition to the Communist Party program and Communist Party leaders in his local union both during the

[1] "No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, will be disclosed to any contractor or contractor employee, or to his lawyer or representatives, or to any other person not authorized to have access to such information." Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553, 32 CFR, Part 67 (Supp. 1958) Section 67.1-4. This regulation, challenged by petitioner's suit, remains unchanged today.

years in question and continuously thereafter (*ibid.*). Lengthy cross-examination by the Board and its counsel served only to reinforce petitioner's testimony (R. 369-406; 409-413). Eleven witnesses took the stand to demonstrate under oath that the charges against petitioner were patently implausible and wholly false. See Pet., pp. 5-6.

After three days of "hearing", the record contained only the testimony of twelve witnesses on direct and cross-examination disproving beyond peradventure of doubt each and every charge against petitioner. Nevertheless, on June 14, 1957, the Defense Department's Director of the Office of Industrial Personnel Security Review wrote petitioner that an adverse determination had been reached and that, "in reaching this determination", the charges of Communist Party membership, dues payment, and affiliation, were all found "*true as stated*" (R. 52). On the basis of this finding, security clearance was finally denied petitioner as "not clearly consistent with the interests of national security" (*ibid.*).

On April 24, 1958, five months having elapsed without action by the Defense Department on petitioner's direct appeal to the Secretary, petitioner filed this suit for injunctive and declaratory relief in the United States District Court for the District of Columbia seeking a review of the denial of his clearance without confrontation by his accusers (R. 1). On May 30, 1958, more than six months after petitioner's appeal to the Secretary of Defense and more than six weeks after the institution of this action, petitioner was advised by letter from the General Counsel at the direction of the Secretary of Defense that the case was being returned to the Hearing Board for further proceedings. In so doing, however, the Defense Department stated that the former adverse determination against petitioner, based on the statements of the secret informants, "*was neither arbitrary*

*nor capricious but was, on the contrary, reasonably supported*" (R. 59-60).

On June 19, 1958, the Hearing Board transmitted to petitioner an Amended Statement of Reasons (R. 68), containing charges substantially identical with the former charges. The only real difference was that, instead of the former allegation that "information before this Board indicates" that petitioner "*may still have* membership in the Communist Party" (R. 38), it was now alleged that the information before the Board indicated that petitioner had been *expelled* from the Communist Party in 1943 (R. 68). In addition, in a civil administrative "indictment" for perjury, petitioner was charged with false testimony at his 1956 hearing in denying former Communist Party affiliation (see Appendix A, p. 31, *infra*). Petitioner immediately denied the amended charges under oath (R. 80). A hearing was scheduled for July 11, 1958, and petitioner appeared with counsel ready to face his accusers only to be told by the Board that no decision had yet been reached on whether to confront him with his accusers (R. 89). The hearing was continued (R. 94). On August 1 the hearing was reconvened and this time the Government flatly announced that it was not going to confront petitioner with his accusers (Pet. p. 8). Instead the Board's Chairman read into the record an anonymous synopsis of accusations by six informants that petitioner had been affiliated with the Communist Party in 1942-43 (R. 102-104). It was quite clear from this synopsis and other indications in the record that the Board itself was forced to rely solely on second-, third- and fourth-degree hearsay assertions against petitioner by persons the Board never examined and that petitioner's accusers are not federal agents secreted in the Communist Party but merely casual informants engaged in private slander (see Pet., pp. 7-8, 14).

On September 12, 1958, petitioner filed in the District Court a Motion for Summary Judgment to which respondents cross-moved. A few minutes before the October 14th argument in the District Court on these motions, counsel was informed that petitioner had once again, on October 13, 1958, been finally denied security clearance. On that date the Defense Department for the second time made a final administrative determination finding petitioner a security risk and denying him access to secret information (R. 120-124). The Department found the charges "*true as stated*" and particularly found that petitioner had "deliberately and knowingly" made "false or misleading" denials of past Communist affiliation (R. 122-123; see Appendix A, *infra*, p. 31). As a result of this latest administrative action on October 13th, the Government on the following day formally withdrew in District Court its prior contention that petitioner had failed to exhaust his administrative remedies (R. 459). The District Court, although "concerned about the administrative proceedings" (R. 473-474), entered summary judgment for the Government (R. 475).

On November 8, 1958 the petition for certiorari was filed. On December 8, 1958, less than two months after petitioner, on the basis of information from secret informants, had been finally determined to be a security risk and to have committed perjury in denying Communist Party affiliation, the Solicitor General informed this Court that the case was the subject of review "by the Departments of Defense and Justice."[2] On December 15, 1958, this Court granted cer-

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[2] The Government states in its Memorandum on Mootness that "the present case has been the subject of continuing administrative review by the Departments of Defense and Justice" (p. 5). We are certain that the Government does not mean to imply to this Court that the case was under "administrative review" between the time of the second final denial of clearance on October 13, 1958 and the Solicitor General's entry into the case after the the petition for certiorari was filed on November 8,

tiorari and assigned the case for argument immediately preceding *Greene* v. *McElroy*, No. 180. On December 31, 1958 the Acting Secretary of Defense found that the "clearance of Charles Allen Taylor is in the ***national interest.***" As unusual as was this sudden and belated about-face, even more unprecedented was the failure of the Secretary to make the prescribed determination that petitioner's clearance was "clearly consistent with the interests of the *national security*" (Industrial Personnel Security Review Regulation, Section 20e) and to issue findings on each of the charges against petitioner, notwithstanding the fact that the Department's own Regulations require that all security determinations "shall include a finding with respect to each of the allegations set forth in the Statement of Reasons" (Industrial Personnel Security Review Regulation, Section 20d).

On January 5, 1959, petitioner's attorney sent a telegram to the Secretary of Defense (see *infra*, Appendix B, p. 33) requesting the issuance of the required findings and specificaliy asking for findings (1) reversing all the earlier findings, (2) withdrawing the false charges, (3) announcing that Mr. Taylor had never been a member of the Communist Party, never paid Communist Party dues, never attended Communist Party meetings, etc., and (4) establishing that he has been truthful in so asserting. The only response to this telgram was a letter of January 6, 1959 from the Department's General Counsel rejecting *sub silentio* petitioner's request for affirmative findings and merely stating that "The language of the order of December 31, 1958 ,which reads '. . . hereby superseding all previous orders in this case' completely expunges all previous

1958. As a matter of fact, the Government itself concedes that "a final administrative determination having the effect of . . . denying 'secret' clearance to petitioner was made on October 13, 1958" (Government Memorandum on Mootness, p. 4).

findings in this case, as if they had never been rendered" (see *infra*, Appendix B, p. 34). Thereupon, on January 10, 1959, petitioner's attorney addressed another telegram (see *infra*, Appendix B, p. 34) to the Secretary of Defense referring to the "unresponsive" nature of the January 6th reply and again requesting the issuance of exculpatory findings that petitioner had never been a Communist Party member and that his denial of such membership had not been perjurious. No response has been received.

Petitioner is now employed by Bell Aircraft under the cloud of two and a half years of grave charges and without the benefit of findings clearing him of those charges or repudiating the assertions of the six secret informants. Indeed, petitioner has already once more been required to fill out personnel security questionnaires, including questionnaires concerning past Communist affiliation, which are the first steps in the standard security clearance procedure to which petitioner is now apparently once more being subjected.

* * *

Notwithstanding:

(i) that the Defense Department refuses to admit any error in its two and a half years of denial of petitioner's clearance without confrontation; steadfastly maintains the validity of the "no-confrontation" provision of its Regulations; refuses to repudiate the accusations by the six secret informants which it can use against petitioner again at any time under its no-confrontation Regulation, and

(ii) that the Justice Department concedes (p. 7) that the "injurious conduct" which petitioner seeks to restrain and have declared unlawful "*may* or may not *recur* . . .",

the Government now has the temerity to suggest that its belated action has deprived this Court of its power of determination. But "clearance" without the adjudication petitioner seeks concerning the contested "hearing" procedures is of little value to petitioner who is faced with the strong likelihood of renewed loss of clearance under the same procedures which have already caused him two and a half years of heartache and penury. As we will show (*infra*, Point II), it is the firm and repeated holding of this Court that suits for declaratory and injunctive relief are not mooted by discontinuance of defendant's challenged conduct where there is a reasonable possibility of its recurrence. And, as we shall also demonstrate (*infra*, Point III), there is a very substantial likelihood that petitioner will once again be subjected to loss of security clearance and employment under the unfair and arbitrary "hearing" procedures he challenges, unless a judicial declaration of their invalidity is forthcoming. The applicable decisions of this Court and the facts of petitioner's case demonstrate that there continues to be a very real case and controversy before the Court and that all policy considerations militate in favor of its resolution.

## II

### Suits for Declaratory and Injunctive Relief Are Not Mooted by Discontinuance of the Challenged Conduct Where There Is a Reasonable Possibility of Its Recurrence

Time and again this Court has rejected the contention that suits for injunctive and declaratory relief are abated merely by the discontinuance of the challenged activity. Since equity actions are preventive rather than compensatory (see *Swift & Co.* v. *United States*, 276 U.S. 311, 326), this Court has uniformly held that discontinuance of the challenged conduct upon which such suits are initially

predicated, does not deprive the Court of power to adjudicate the controversy and issue a decree preventing recurrence. See cases collected in Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125; Note, *Cases Moot on Appeal*, 103 U. Pa L. Rev. 772.

As long as there is possibility of recurrence, cessation of challenged activity does not deprive federal courts of constitutional authority to grant relief against renewed violations. This rule applies equally where private persons have discontinued activity against which the Government seeks relief (*United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290; *Walling* v. *Helmerich & Payne*, 323 U.S. 37; *United States* v. *W. T. Grant Co.*, 345 U.S. 629), and where the Government has discontinued activity against which private persons seek relief (see *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 514-16; *McGrain* v. *Daugherty*, 273 U.S. 135, 180-182; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 413-14).[3] A clear exposition of the pertinent authorities appears in the Government's Brief in the case of *United States* v. *W. T. Grant Co.*, 345 U.S. 629, the most recent judicial reaffirmation of the applicable rule on mootness, where the Government pointed out (pp. 11-13):

> "'Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.' *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43. As the Court further said in that case (*ibid.*), where the defendant 'has consistently urged the validity' of the conduct which he has discontinued and would be free to resume it if no judicial restraint were imposed, there is 'an actual controversy, and adverse interests' (*Lord* v. *Veazie*, 8 How. 251,

[3] This broad principle applies equally in litigation between private parties. See *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U. S. 202.

255), with a 'subject-matter on which the judgment of the court can operate' . . .

. " . . . mere abandonment of the challenged practices—particularly after suit to enjoin them has been filed—does not put an end to the controversy. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 307-310; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260; *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 42-43. *Cf. National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563, 567-568. An action to enjoin an order of the Interstate Commerce Commission has been held not moot even though the order had expired, where the order 'was capable of repetition by the commission and was a matter of public interest.' *McGrain* v. *Daugherty*, 273 U.S. 135, 182; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 514-516; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433, 452 . . . As long as the 'issue as to whether future violations should be enjoined' is still before the court, the case is not moot."

This analysis by the Government was fully approved in this Court's decision in the *Grant* case, which explicitly reaffirmed the traditional rule that

". . . cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290; *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37; *Hecht Co.* v. *Bowles*, 321 U.S. 321. A controversy may remain to be settled in such circumstances, *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448, e.g., a dispute over the legality of the challenged practices.

*Walling* v. *Helmerich & Payne, Inc.*, *supra*; *Carpenters Union* v. *Labor Board*, 341 U.S. 707, 715. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. *United States* v. *Trans-Missouri Freight Ass'n* . . ." (345 U.S. at p. 632).

To the no-case-or-controversy contention, one presently being urged by the Government, the decision gave the long-accepted response that:

"Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. *Hecht Co.* v. *Bowles*, *supra*; *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U.S. 202. The purpose of an injunction is to prevent future violations, *Swift & Co.* v. *United States*, 276 U.S. 311, 326, and of course, it can be utilized even without a showing of past wrongs" (at p. 633).

The Court emphasized that discontinuance of challenged conduct, even when accompanied by a profession of its permanent abandonment "does not suffice to make a case moot", although "it is one of the factors to be considered in determining the *appropriateness* of granting an injunction against the now-discontinued acts" (emphasis supplied). Cf. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 421.

It is too late in the day to question this Court's authority to adjudicate a suit for declaratory or injunctive relief where the conduct upon which the action is predicated has been discontinued while the case is *sub judice*, under circumstances giving no assurance against its repetition. In such cases this Court has expressly upheld and exercised its jurisdiction on numerous occasions ever since its deci-

sion in *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290.[4]

Nor is it of any avail for the Government to suggest, as it does in its Memorandum (p. 7), that, because the suit is *against* the Government, the "situation is not at all the same as if a private defendant had voluntarily ceased some challenged conduct alleged to be unlawful." This suggestion of a "double standard" of mootness was long ago expressly rejected by the Court in *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498. In its Brief in the *Southern Pacific* case (at p. 20), the Government had referred to the *Trans-Missouri* decision, where this Court first applied the continuing jurisdiction principle, and suggested that "in the *Trans-Missouri* case the public interest was concerned in having the case heard which the railroads contended was moot, while in the case at bar the contrary situation exists . . ." But this Court's opinion (219 U.S. at 516) rejected any distinction between cases where private individuals have discontinued conduct the Government seeks to enjoin (*Trans-Missouri*) and those in which the Government has discontinued conduct private individuals seek to have declared unlawful (*Southern Pacific*), holding that the circumstance "*that the Government is the respondent, not complainant, does not*

[4] See, e.g., *Southern Pacific Co.* v. *ICC*, 219 U.S. 433, 452; *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 514-16; *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U.S. 202; *McGrain* v. *Daugherty*, 273 U.S. 135, 180-182; *Leonard* v. *Earle*, 279 U.S. 392; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 413-14; *NLRB* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261; *FTC* v. *Goodyear Co.*, 304 U.S. 257; *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 555-6; *Walling* v. *Reuter Co.*, 321 U.S. 671; *Walling* v. *Helmerich & Payne*, 323 U.S. 37; *Porter* v. *Lee*, 328 U.S. 246, 251-52; *Ford Motor Co.* v. *United States*, 335 U.S. 303, 313; *NLRB* v. *Crompton-Highland Mills*, 337 U.S. 217, 225; *NLRB* v. *Mexia Textile Mills*, 339 U.S. 563, 567-8; *Henderson* v. *United States*, 339 U.S. 816, 823; *United States* v. *W. T. Grant Co.*, 345 U.S. 629; *Carpenters Union* v. *Labor Board*, 357 U.S. 93, 97, n. 2.

*lessen or change*" the Court's constitutional authority to adjudicate a suit involving a recurring public controversy.[5] Subsequent decisions of this Court have adhered to the *Southern Pacific* ruling, upholding its authority to adjudicate suits for prospective relief against governmental conduct which has been discontinued but is subject to renewal. See, e.g., *Panama Refining Co.*, v. *Ryan*, 293 U.S. 388, 413-14; *Leonard* v. *Earle*, 279 U.S. 392; *McGrain* v. *Daugherty*, 273 U.S. 135, 180-182; *cf. United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 555-6; *FTC* v. *Goodyear Co.*, 304 U.S. 257, 260; *Fiswick* v. *United States*, 329 U.S. 211, 221-22; *Henderson* v. *United States*, 339 U.S. 816, 823.

The "case or controversy" clause of the Constitution does not discriminate against private actions; no reason is urged or appears why this Court should overrule *Southern Pacific* and later cases to create a double standard of mootness. On the contrary, if any double standard were appropriate in this area, it is the individual who should be favored. The Government is, after all, amply protected against recurring private violations of law even without injunctive relief—not only by the vast financial and personnel resources it can marshal against renewed violations, but also by a substantial arsenal of statutory power to obtain expeditious restraint against violators. The individual, on the other hand, has no such extra-judicial resources, financial or statutory, against recurrent violation of his rights by the Government. Petitioner's own record is illustrative—two and a half years of degradation and unemployment, coupled with vast legal efforts culminating in this Court, were required before petitioner was able to

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[5] The Court later reaffirmed the fact that there were only *"immaterial differences"* between *Southern Pacific* and *Trans-Missouri*, and pointed out that "in terms the ruling in the *Southern Pacific Case* was based upon the decision in the *Trans-Missouri Case.*" *United States* v. *Hamburg-Amerikanische Co.*, 239 U.S. 466, 477.

achieve any redress whatever. We find difficulty in understanding the basis for the Government's suggestion of a double standard of mootness which would deny relief to the largely defenseless individual, while affording it to the all-powerful Government.

In any event we do not believe this Court will seriously consider overruling *Southern Pacific* and adopting the double standard there rejected when the Government cites neither policy nor precedent for such a sharp break with established law. Thus, although the Government cites twenty-six cases for its mootness contention, not a single one affects the pending issue. Twenty of the cases were decided by this Court without opinion and in most of these the suggestion of mootness was either unopposed or urged by all parties. Of the six remaining cases, in which the grounds of decision were announced, five do not bear upon the *Trans-Missouri—Southern Pacific* rule on which petitioner relies [6] and the sixth is in no sense inconsistent with it.[7]

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[6] *California* v. *San Pablo & Tulare R.R. Co.*, 149 U.S. 308, was a suit by the state to recover assessed taxes which was mooted by their payment. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, was a suit to annul an ICC order prescribing two forms of bills of lading which was mooted by passage of the Transportation Act of 1920 requiring different forms of bills of lading from those challenged in the suit. *Brownlow* v. *Schwartz*, 261 U.S. 216, was an action to compel issuance of a building permit which was mooted by issuance of the permit, construction of the building and termination of plaintiff's financial interest therein. *U.S. ex rel. Norwegian Nitrogen Products Co.* v. *U.S. Tariff Commission*, 274 U.S. 106, was a suit by a foreign importer to compel revelation of information at a discretionary hearing before the Tariff Commission which was mooted by completion of the Commission's discretionary function and Presidential issuance of the revised tariff. *United States* v. *Munsingwear*, 340 U.S. 36, was not a decision on the issue of mootness at all, but simply involved the res judicata effect of an earlier lower court determination of mootness.

[7] *Commercial Cable Co.* v. *Burleson*, 250 U.S. 360. There, pursuant to Joint Resolution of Congress passed on July 16, 1918, "*during the continuance of the present war*" the President was authorized to take possession of marine cable systems. Plaintiffs were owners of a cable

Having neither policy nor precedent with which to withstand the established rule, the Government simply seeks to evade it by urging that the granting of security clearance gave petitioner all he might have sought in this litigation and all that the courts could afford him. Thus the Government's Memorandum (p. 6) states:

> "The ultimate relief which might be sought in this litigation (but was not in fact sought), *i.e.*, a determination of eligibility for access to classified defense information, has been afforded petitioner by the new administrative order. No further relief from the respondents is available, or can be granted to petitioner in this proceeding."

The Government is wrong on several counts: a "determination of eligibility for access to classified defense information"—that is, clearance—is not the relief sought (which the Government concedes), is not "the ultimate relief which might be sought", is not all the relief "available" to and required by petitioner and is not all the relief which "can be granted to petitioner in this proceeding."

(i) Actually, petitioner has not yet obtained the relief to which he addressed the very first prayer of his complaint—a declaratory judgment that

> "plaintiff is entitled to a full and fair hearing before defendants or their agents upon the charges

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system seized pursuant to Presidential Proclamation of November 2, 1918. While the case was pending before this Court the plaintiffs' property was returned to them by Presidential order. Under these circumstances plaintiffs' fanciful contention that the lines "may again be wrongfully taken" was necessarily dismissed by this Court. At the time of this Court's mootness decision (June 9, 1919), the Armistice had been in effect since November 11, 1918, and even the Peace Conference had been concluded. These events certainly left no room for the possibility that the President would once more seize the lines "during the continuance of" the war. The case is thus entirely consistent with the *Trans-Missouri—Southern Pacific* doctrine.

against him, at which hearing he is given opportunity to be confronted with the witnesses and the evidence upon which the charges are based."

Of course petitioner might *also* have sought what the Solicitor General concedes that he did not seek—a judicial restoration of his security clearance—in addition to injunctive and declaratory relief against the Department's unfair hearing procedures. But however that may be, it is an undeniable fact that petitioner has not yet been afforded his requested adjudication that the no-confrontation requirement of the Defense Department's Industrial Security Hearing Regulations is constitutionally and statutorily defective. *That Regulation continues in effect without alteration,* and as we demonstrate hereafter (see *infra*, pp. 19 to 28), there is the strongest likelihood that petitioner will again suffer thereunder unless he obtains his requested relief.

(ii) The hasty last minute "clearance" is not all the relief "available" to and required by petitioner. Far from it, petitioner will never be safe while the Defense Department refuses to find that the statements of the six secret informants are false and insists that it has a right to retry petitioner at any time without benefit of confrontation. In view of the likelihood of recurrence (see pp. 19-28, *infra*), we respectfully suggest that the "relief" which the Government has given petitioner—clearance good for this day and this day only—is far from the "available" and needed protection of a judicial declaration invalidating the "no-confrontation" hearing procedures.

(iii) The Government's belated clearance is not all the relief which this Court can afford him. An injunctive or declaratory decree that petitioner is entitled to a fair hearing will make impossible a repetition of two and a half years

of security taint and unemployment. As we have already demonstrated, nothing in the "case or controversy" limitation upon this Court's jurisdiction grants the Government a weapon with which to disarm this Court so that it becomes incapable of protecting litigants and vindicating their rights against recurrent oppression.[8]

It is thus clear that, where as here there is a likelihood that petitioner will once again be subjected to the unfair hearing procedures prescribed by the Department's no-confrontation Regulation, this Court's jurisdiction is not defeated by the Government's last minute attempt to prevent its exercise. We turn now to demonstrate the real likelihood that, unless judicially restrained, respondents will once again deprive petitioner of that right to a fair hearing which he asks this Court to declare and vindicate.

## III

## There Is Substantial Likelihood That Petitioner Will Once Again Be Subjected to Loss of Security Clearance Under the Unfair and Arbitrary Hearing Procedures Which His Suit Challenges

This Court has stated in different ways what degree of probability of recurrence is required in order to invoke

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[8] The Government also suggests (p. 7) that petitioner's "suit attacks, not merely some injurious conduct which may or may not recur, but a particular official administrative order" which has now been replaced by a different order. Of course petitioner's suit involved "a particular official administrative order"; much, if not most, action to restrain governmental conduct is instituted to affect a particular order then outstanding. But it is the very essence of the *Southern Pacific* doctrine that the expiration or withdrawal of a particular governmental order does not moot a case when there is a likelihood of the issuance of a new order adversely affecting the rights of the litigants. See cases cited *supra*, p. 15. Petitioner's complaint was predicated upon the Defense Department's proceedings culminating in an adverse order reflecting a course of injurious conduct which even the Government admits "may recur" unless judicially restrained.

equity jurisdiction when challenged conduct has been discontinued. It has held adjudication on the merits appropriate where the discontinued conduct is "*capable of repetition*" by defendant (*Southern Pacific Terminal Co.* v. *ICC.*, 219 U.S. 498, 514-16; *McGrain* v. *Daugherty*, 273 U.S. 135, 182), where defendant is "*free to resume*" his conduct (*Walling* v. *Helmerich & Payne*, 323 U.S. 37), or where circumstances "*permit the recurrence*" (*Henderson* v. *United States*, 339 U.S. 816, 823); and it has recently approved Judge Hand's formulation requiring *defendant to demonstrate that "there is no reasonable expectation that the wrong will be repeated"* (*United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633). If these be the controlling criteria, no more need be said; clearly, respondents are "free to resume" their proceedings against petitioner and, far from attempting a demonstration to the contrary, the Government concedes that the injurious conduct *may recur* (p. 7).

Even assuming, however, that the standard were stricter than a mere "capability" of resumption and were to require a showing of its "likelihood",[9] petitioner's case eminently meets established standards for finding such a likelihood of renewal. Thus, in determining whether there is sufficient probability of renewal to avoid a contention of mootness, this Court has particularly emphasized two criteria:

First, whether the discontinued activity reflects an isolated instance or a continuing course of conduct, and,

Second, whether discontinuance occurs at a time and in a manner reflecting confession of error and renunciation of

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[9] "The fundamental issue is whether the acts sought to be enjoined have been completely abandoned, or whether there is a likelihood of their renewal." Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 137.

the challenged practice or merely at a time and in a manner calculated to prevent impending judicial redress against a practice whose propriety defendant continues to assert.

Although either of these tests, if met, is sufficient to sustain a finding of "likelihood of renewal", we shall show that, as a matter of fact, petitioner's case clearly meets both of these guiding criteria.

A. *Petitioner Remains Subject to Renewed Loss of Clearance Without Confrontation in the Defense Department's Continuing Clearance Program*

In measuring the likelihood of renewal a primary test applied by this Court is whether the discontinued activity upon which the request for injunctive relief is predicated represents an isolated act or merely one in a continuing series (see *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 514-16; *Leonard* v. *Earle*, 279 U.S. 392; *McGrain* v. *Daugherty*, 273 U.S. 135; 94 U. Pa. L. Rev. at 135-137 and cases cited). Petitioner, a highly skilled tool maker, is clearly subject to a continuing series of security screenings and proceedings as long as he continues to practice his "sensitive" skill at Bell Aircraft or elsewhere.

Security screening, whether of Government employees or of industrial workers, is in its very nature a continuing process. All of the Government's loyalty and security programs have been based upon the proposition that the "internal security of the Government demands continuous screening, scrutiny and surveillance of present and prospective employees."[10] Pursuant to this policy the Defense

[10] See Report of the President's Temporary Commission on Employee Loyalty, March 22, 1947; Appendix, p. 1331, 1338, Hearings Before a Subcommittee of the Committee on Post Office and Civil Service, United States Senate, 84th Cong., 1st and 2d Sessions, on "Administration of the Federal Employees' Security Program."

Department Regulations, like the other Government security programs, permit, and in practice result in, continuous screening and regular reopening of security clearances.[11]

Thus, no finality attaches to the granting of a security clearance under the Defense Department's "continuous surveillance" program. But, in measuring the likelihood of a renewal we do not rely merely upon the continuing nature of security surveillance as a matter of law and governmental policy, but also upon the consideration that as a matter of fact those whom the Government once finds suspect are subject to an unending series of security charges, rehearings and redeterminations. In the words of the Chairman of the American Federation of Scientists testifying before a Senate Committee:

> "Multiple jeopardy has occurred many times in security cases. At Fort Monmouth virtually all of the 20 or 30 individuals charged or suspended had been cleared several times previously, and most of them were reinstated after full hearings. At present a man must be cleared again whenever shifting to a new agency, or to a new geographical division of the same agency. Some individuals have been cleared 20 times. This is hard on morale, a source of worry to the individual, causes delays and inefficiency and is unnecessarily expensive.
>
> "I could speak of my own experience, of having to have an additional two clearances, including making out the PSQ's all over again when I was to do some work on the west coast of this country for the Atomic Energy

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[11] Armed Forces Industrial Security Regulation, dated September 21, 1956, Section 6-110; Section 2-202b, c; Section 2-209b; Industrial Personnel Security Review Regulation, Section 21, 22, 24(c).

> Commission, although I had already been cleared on the east coast; there was a new security investigation." [12]

A recent study by Professor Ralph Brown of Yale Law School provides a table of "Previous Loyalty-Security Proceedings" in a sample of 337 cases.[13] The data shows that of these 337 cases almost half the employees were subject to multiple proceedings. This absence of finality in clearance has led to reform recommendations by a Committee of the New York City Bar Association. In its 1956 study of the general subject, "The Federal Loyalty-Security Program," the Committee states (at p. 184):

> "Successive security determinations concerning a particular individual are now frequent. They are an unsettling factor in the security programs. Employees subject to repetition of clearance are placed under an annoying burden. The impact is unfortunate upon the government also, for employees are discouraged from taking or continuing in jobs subject to the security system when they are faced with repeated security proceedings."

And if there were any remaining doubt concerning the continuous subjection of employees, especially those once suspect, to proceedings under the Government security programs, this Court need look no further than the record in cases recently before the Court itself:

In *Peters* v. *Hobby*, 349 U.S. 331 (see Brief for Peters, pp. 3-5), the employee was subjected to three separate

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[12] Hearings before a subcommittee of the Committee on Government Operations, 84th Cong., 1st Sess., on S.J. Res. 21, p. 411. And see testimony of John Phelps, Secretary, Scientists Committee on Loyalty and Security, Federation of American Scientists, Hearings, *supra*, n. 9, at p. 906.

[13] *Brown, Loyalty and Security* (1958, Yale University Press), Appendix B, p. 491.

clearance proceedings. In January 1949 Dr. Peters received and filled out a loyalty interrogatory. Shortly thereafter he was informed that the Public Health Service loyalty board had found no evidence of any disloyalty. Two years later, in December 1951, he was informed that his loyalty was being reexamined. Following charges and a formal hearing, the Board again determined, in May of 1952, that there was no doubt as to Dr. Peters' loyalty. One year later his case was reexamined on its own motion by the Civil Service Commission and after various proceedings it was determined that there was a doubt as to Dr. Peters' loyalty and he was dismissed.

*Service* v. *Dulles*, 354 U.S. 363, is equally illustrative (see Brief for Service, pp. 4-7). In 1945, following an incident which led the State Department to question Mr. Service's loyalty, he was suspended but subsequently reinstated in his job in August of 1945. His case was reviewed a number of times by the State Department which cleared him in 1946, 1947 and 1949. Nevertheless, in 1950 he was charged and a hearing was held before the Department of State Loyalty-Security Board which found him to be loyal. In July of 1951, on a reconsideration, that Board reaffirmed its 1950 finding. In the fall of 1951 new hearings were ordered, resulting in an adverse determination and, subsequently, in his dismissal from the Foreign Service.

*Greene* v. *McElroy*, No. 180,, presently pending, is also enlightening. Prior to 1951 Mr. Greene has been cleared for "top secret." In that year his clearance was suspended, charges were issued and hearings held, resulting in the final restoration of his clearance. Nevertheless in April of 1953 the Secretary of Navy on his own motion and without prior warnings or proceedings revoked Mr. Greene's clearance as "not clearly consistent with the interests of national se-

curity." That result was reaffirmed after a new set of hearings.[14]

Thus this Court need not go beyond the cases recently before it to find how continuously and endlessly those once suspect are subjected to security proceedings. But what makes petitioner's renewed subjection to the unfair hearing procedures prescribed by the Defense Department even more probable is the fact that, far from renouncing the accusations of the six secret informants against petitioner upon which it has relied for two and a half years, the Government has refused to make findings repudiating these secret informants. The Defense Department continues to affirm not only the legality of its Regulation under which confrontation has twice arbitrarily been denied petitioner and will again be denied him in new proceedings, but the Department still refuses to accept petitioner's sworn affirmation that he was never affiliated with the Communist Party. We turn now to this demonstration.

B. *The Government's Last Moment Attempt to Avoid an Adjudication Reflects No Abandonment Either of Its Accusations Against Petitioner or the Unfair Hearing Procedures Presently in Issue.*

An important element in this Court's determination whether challenged conduct is sufficiently likely to be renewed to warrant the granting of injunctive or declaratory relief is whether the abandonment is accompanied by a confession of the error and wrongfulness of the challenged

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[14] One of the landmark cases in the Defense Department's Industrial Security Program is that of Edward U. Condon. As director of research at Corning Glass, Dr. Condon was required to have security clearance. Having successfully survived numerous successive clearance proceedings between 1940 and 1954, Dr. Condon was nevertheless denied clearance by the Secretary of the Navy in October, 1954, whereupon he resigned his position rather than face a lifetime of continuing security proceedings. See New York Times, December 14, 1954, pp. 1, 20.

conduct or reflects merely a desire by defendants to avoid a binding adjudication which would preclude repetition of their unlawful activity. See *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U.S. 202; *Walling* v. *Reuter Co.*, 321 U.S. 671; *Walling* v. *Helmerich & Payne*, 323 U.S. 37; 94 U. Pa. L. Rev. at 140 and cases cited. We doubt that even the Government will suggest that its last-minute action reflects anything except the latter consideration.

As we have seen (*supra*, pp. 8 to 10), there has been no abandonment by respondents either of their accusations against petitioner upon which they relied in numerous charges and findings for the past two and a half years nor of the unfair hearing procedures the legality of which they have continuously asserted.[15] Notwithstanding that the Department's own Regulations require findings on each of the charges in the Statement of Reasons, the Secretary has issued no such findings accompanying his security determination of December 31, 1958. Only last October the Defense Department made a second final determination that petitioner had been a Communist Party member and had committed perjury in denying it (see *supra*, p. 7). Nevertheless, despite two emphatic requests by petitioner's counsel (see *infra*, Appendix B, pp. 33 to 35), the Secretary has

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[15] During the argument before the District Court on October 14, 1958, counsel for respondents bluntly asserted that the "hearing" granted persons charged with being security risks need not be a full and fair hearing:

> "First of all, I would like to say that the Plaintiff is not entitled to 'a full and fair hearing.' He used that term, but that is a term used in the Administrative Procedures Act—equivalent to judicial trial. No full and fair hearing. It is used as a term of art. No requirement there be confrontation of witnesses; and no requirement that there be compulsory disclosure of the Government's files" (R. 470).

No slightest intimation of a repudiation of this official statement has yet appeared in this proceeding or elsewhere.

refused to disavow his repeated accusations, to find that petitioner was never a Communist Party member and, indeed, even to issue any findings whatever.

Moreover, the Secretary has even failed to meet the specific requirement of his Industrial Personnel Security Regulations that clearances include a statement that "the granting of clearance . . . for access to classified information is clearly consistent with the interests of the national security" (§ 20e). As far as published reports indicate, petitioner's is the first case in the history of the Industrial Security Program where clearance was granted in the "*national interest*" rather than in the interest of "*national security*" as required by the Regulations. This unprecedented departure from the Regulations must find its explanation in the Secretary's willingness to assist the Department of Justice by finding petitioner's clearance in the "national interest", while still refusing to hold that his clearance is "clearly consistent with the interests of national security", for the simple reason that the Department will not disavow nor reject the accusations of its six secret informants. In a word, the Secretary gave petitioner a clearance without finding him innocent or secure.

After two and a half years of security proceedings petitioner's clearance is apparently still inconsistent with the national security interest, but is apparently required by some *other* national interest. If that other interest were abated by the dismissal as moot of petitioner's suit, the interest of national "security" might well once again assume the overriding importance it was given by respondents until this Court's grant of *certiorari*. Under these circumstances the second criteria of "likelihood" of renewal is fully met, for it is clear there has been no confession whatever of the error and wrongfulness of the procedure petitioner chal-

lenges, but merely a last minute attempt to avoid a binding adjudication which might serve to limit the Defense Department's use of the unfair and one-sided "hearing" procedure prescribed by its continuing Regulation.[16]

## Conclusion

A primary ground for review relied upon in petitioner's request for certiorari was the fact that this case provides material illumination and amplification on the confrontation issue. Petitioner pointed out that his case illustrates the incredible, yet inevitable, injustice which results from the arbitrary denial of confrontation in security hearings. Respondents' most recent action has not diminished, but rather increased, the considerations militating towards this Court's review. Two and a half months after the Department of Defense had for a second time finally validated the accusations of faceless informants that petitioner had been a Communist Party member (and that he has perjuriously denied such membership), the same Department found petitioner's clearance for secret information "in the national interest." We cannot imagine a clearer illustration of the inevitable unfairness of a "hearing" Regulation which precludes confrontation than the various decisions here which permitted diametrically opposed conclusions on the identical undisclosed "evidence".

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[16] No similar effort to moot the *Greene* case has been made, apparently because the Government has no fear of a "confrontation" adjudication there. In its suggestion of mootness in the case at bar, the Government points out that "the *Greene* case is still pending and will present to the Court the *general* validity of the Industrial Security Program of the Defense Department" (p. 10; emphasis supplied). This delicate phraseology is not unintentional, but rather quite consistent with the Government's position in opposing certiorari in *Greene* that that case does *not* present any issue of confrontation for this Court's determination (*Greene* Op., p. 16).

In any event, on the single question of mootness here presented, it is clear that there continues to be a case and controversy for judicial resolution. Petitioner continues subject to the likelihood of further security proceedings under the "no-confrontation" Regulation notwithstanding his last minute clearance "in the national interest" rather than the interest of "national security." As long as *Southern Pacific* stands as precedent, the Government cannot, any more than a private individual, preclude a binding adjudication by unrepentent discontinuance of its *sub judice* practices.

We fully appreciate the Solicitor General's difficulty in being asked to justify the Defense Department's "no-confrontation" procedure before this Court.[17] But we respectfully suggest that the appropriate course for the Government is confession of error in this Court or a return to traditional hearing practices by the abandonment of the Defense Department's no-confrontation Regulation. As this Court observed in *Young* v. *United States*, 315 U.S. 257, 258:

> "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent."

It is respectfully submitted that respondents' suggestion of mootness be denied or, if the question of mootness be deemed worthy of further consideration, that its deter-

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[17] This is not the first time that a dilemma on the issue of confrontation has been presented to the Solicitor General. When a similar issue was presented in *Peters* v. *Hobby*, 349 U.S. 331, the Solicitor General declined to file a brief or give oral argument on behalf of the Government.

mination be deferred until after the Court has had the benefit of the oral arguments.

Respectfully submitted,

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# APPENDIX A

*Amended Statement of Reasons of June 19, 1958 (R. 72-73) against Charles Allen Taylor* [18]

"(2) Your sworn reply dated October 9, 1956 to the Statement of Reasons issued under date of September 10, 1956, and your testimony given under the applicability of Title 18, Section 1001, of the United States Code, during the hearing held in your case before the New York Industrial Personnel Security Hearing Board on November 1, 2, and 14, 1956, contain, in substance, the following material statements which were deliberately and knowingly either false or misleading.

(a) That you have never been a member of the Communist Party or of any branch of the Communist Party.

(b) That before your receipt of the Statement of Reasons in this case you had no knowledge of the subversive aims and purposes of the Communist Party.

(c) That you have never had a sympathetic interest in Communism.

(d) That you have not knowingly paid Communist Party dues.

(e) That you have never paid any money that to your knowledge went to the Communist Party.

(f) That you have not attended Communist Party meetings.

(g) That you have never visited Communist Party Headquarters when located at 75½ W. Chippewa Street, Buffalo, New York.

(h) That no group or organization other than your own local union sought your support for opposition to the "no strike pledge" during 1942 and 1943 while you were employed by Bell Aircraft at Buffalo, New York.

(i) That you did not know Clara Lester or ever hear her name until the hearing mentioned in subparagraph 4(2), preceding.

(j) That you did not know Svea Kate (Katz).

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[18] These charges were found "true as stated" as late as October 13, 1958 (R. 120, 122-3).

(k) That you did not know Sam Wiseman, at least not prior to 1943.

(l) That your answer "None" to Item 26 of your aforementioned Personnel Security Questionnaires dated 8 September 1954 and 2 July 1956, in so far as such answer was intended to encompass membership in the Communist Party or any of its subdivisions, subsidiaries, and affiliates, was a truthful answer.

(m) That your answer "No" to questions 1 through 6 of your aforementioned "Certificate of Non-Affiliation with certain Organizations" dated 2 July 1956, in so far as such answer was intended to encompass membership in the Communist Party or any of its subdivisions, subsidiaries, and affiliates, and in so far as it was intended to encompass affiliation or association with the Socialist Workers Party or with the Communist Party or any of its subdivisions, subsidiaries, and affiliates, was a truthful answer."

## APPENDIX B

*Telegram from Joseph L. Rauh, Jr., to the Secretary of Defense, January 5, 1959*

"Reference is made to security case of Charles Allen Taylor. In September 1956 Taylor was falsely charged by Statement of Reasons emanating from office of Secretary of Defense with having been a member of, having paid dues to, and having held a membership card in, the Communist Party. In June 1957 your office found these charges quote true as stated unquote. On February 3, 1958 following a direct appeal to you by Mr. Taylor, your General Counsel held that the adverse findings against Mr. Taylor were quote reasonably supported unquote and on May 30 he reiterated that determination quote by direction of the Secretary of Defense unquote. As late as October 13, 1958 your office issued findings not only reaffirming the earlier findings of Taylor's past Communist membership and activity but also finding that he had under oath quote deliberately and knowingly unquote made quote false or misleading statements unquote in denying past membership and activity. These findings were predicated upon accusations by secret informants unknown to Mr. Taylor. On the basis of this secret information and the findings that Mr. Taylor had been a Communist and was now a perjurer, your office concluded on October 13, 1958 that the granting of clearance to Mr. Taylor quote for access to classified defense information is not clearly consistent with the interests of national security unquote. On December 31, 1958, after the supreme court granted certiorari in Mr. Taylor's case, your office advised quote that the Secretary of Defense, after considering all the available information, has determined that the granting of clearance to Mr. Charles Allen Taylor for access to secret defense information is in the national interest unquote. Despite the regulations of the Department of Defense explicitly requiring that security determinations shall include findings with respect to each of the allegations set forth in the Statement of Reasons, you have made no new findings whatever. We respectfully request immediate

findings (i) reversing the earlier findings, (ii) withdrawing the false charges, (iii) announcing that Mr. Taylor has never been a member of the Communist Party, never paid Communist Party dues, never attended Communist Party meetings, etc., and (iv) establishing that he has been truthful in so asserting. Failure to issue new findings fully clearing Mr. Taylor of charges against him asserted in Statement of Reasons and renouncing all reliance upon the secret informants who gave erroneous adverse information only compounds the incredible injustice done Mr. Taylor by two and a h[illegible]f years of security taint based on the now admittedly false statements of secret informants."

*Letter from General Counsel of Department of Defense to Joseph L. Rauh, Jr., January 6, 1959*

I write at the direction of the Secretary of Defense to reply to your telegram of January 5, 1959, addressed to the Secretary in connection with the matter of the industrial security clearance of your client, Charles Allen Taylor.

The language of the order of December 31, 1958, which reads "* * * hereby superseding all previous orders in this case" completely expunges all previous findings in this case, as if they had never been rendered.

The Secretary, by his "Finding and Order" of December 31, 1958, has found that the requested clearance of Charles Allen Taylor should be granted.

*Telegram from Joseph L. Rauh, Jr., to the Secretary of Defense, January 10, 1959*

"On January 5th we telegraphed you concerning the Charles Allen Taylor case asking that you issue findings quote (i) reversing the earlier findings, (ii) withdrawing the false charges, (iii) announcing that Mr. Taylor has never been a member of the Communist Party, never paid Communist Party dues, never attended Communist Party meetings, etc., and (iv) establishing that he has been truthful in so asserting unquote. We have now received General Counsel Dechert's reply of January 6th stating that the order of December 31, 1958 quote completely expunges all

previous findings in this case, as if that had never been rendered unquote. You will readily recognize that this reply is unresponsive and does not meet the regulations of your Department. Defense Department Industrial Security Regulations require that security determinations quote shall include a finding with respect to each of the allegations set forth in the statement of reasons unquote. Your withdrawal of findings can in no way be interpreted as the findings required by these regulations. We again request a finding on each of the allegations in the statement of reasons. As we stated in our telegram of January 5th quote failure to issue new findings fully clearing Mr. Taylor of charges against him asserted in Statement of Reasons and renouncing all reliance upon the secret informants who gave erroneous adverse information only compounds the incredible injustice done Mr. Taylor by two and a half years of security taint based on the now admittedly false statements of secret informants unquote."

(3897-6)